



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
BAR LEADERS SERIES**

**EMPLOYEE BENEFIT MANAGERS, INC. & CHARLES BELCH v.
INDIANA DEPARTMENT OF INSURANCE**

Appeal from:
Allen Superior Court
The Honorable Stanley A.
Levine, Judge

Oral Argument:
Tuesday, February 19, 2008
2:00—3:00 p.m.
30 minutes each side

QUESTIONS BEFORE THE COURT

- I. Is the Department order ultra vires because the Department lacked subject matter jurisdiction over Employee Benefit Managers?
- II. Did the finding that Employee Benefit Managers was dishonest and financially irresponsible constitute an abuse of discretion because it lacks substantial evidentiary support?
- III. Did the finding that Employee Benefit Managers failed to arrange for the payment of unfunded claims constitute an abuse of discretion because it lacks substantial evidentiary support?
- IV. Did the finding that Employee Benefit Managers violated paragraph 5(e) of the Agreed Entry constitute an abuse of discretion because it lacks substantial evidentiary support?
- V. Was Employee Benefit Managers denied due process because the Department failed to conduct sufficient compliance hearings?

Employee Benefit Managers, Inc. and Charles Belch v. Indiana Department of Insurance

CASE SYNOPSIS

Facts and Procedural History



Employee Benefit Managers, Inc. of America (“EBM”) manages the funding and administration of self-funded employee benefit plans for employer-clients. The Indiana Department of Insurance (“the Department”) brought charges against EBM and its President, Charles Belch (“Belch”) due to concerns of unfunded claims and misrepresentations to employer-clients. The parties executed an Agreed Entry on November 9, 2004 and the Department monitored compliance until it ultimately issued a Cease and Desist Order on February 17, 2006 revoking EBM’s and Belch’s insurance licenses. EBM sought judicial review and the Allen County Superior Court affirmed the Cease and Desist Order/Final Order on February 12, 2007. EBM has now sought review of the trial court decision.

the licenses are not used to engage in insurance activities. EBM draws an analogy to one holding a driver’s license but not actually using it, with the Bureau of Motor Vehicles having no inherent power to regulate the individual merely because of his driver’s license. EBM concedes that, in light of the Agreed Entry, the Department may have exercised personal jurisdiction, but maintains that subject matter jurisdiction was not, and could not, have been conferred upon the Department. EBM also argues that, assuming the Department properly exercised jurisdiction over EBM at one time, the Department was divested of its jurisdiction when EBM ceased commingling funds. According to EBM, this meant that all its actions were then exclusively within the purview of ERISA and regulated by the Department of Labor.

Parties’ Arguments

Jurisdiction

The trial court found that the Department had jurisdiction over EBM because (1) EBM and Belch held insurance licenses; (2) the terms of the Agreed Entry provided that the Department had jurisdiction over EBM; and (3) EBM was producing products that look and act like insurance.

EBM argues that it is not an “insurance company” because it doesn’t produce and sell insurance. According to EBM, licensure is irrelevant so long as

The Department reiterates the trial court findings and also asserts that EBM has not substantiated its claim that its product or activities are within ERISA and regulated by the Department of Labor (to which EBM replies that evidence was proffered and rejected in the Department proceedings). The Department also contends that the jurisdictional issue was waived by EBM’s failure to raise a jurisdictional challenge in a timely request for judicial review within thirty days of the Agreed Entry. See Ind. Code § 4-21.5-5-5.

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Evidentiary Support for Findings

EBM challenges the Department's findings (affirmed by the trial court) to the effect that: EBM engaged in dishonest and financially irresponsible actions by leading employers to believe that funding was in place when it was not, EBM failed to comply with the Agreed Entry requirement of arranging for payment of all unfunded claims, and EBM violated paragraph 5(e) of the Agreed Entry by failing to provide documents defining specifically the terms of claims funding arrangements.

EBM makes a variety of arguments that essentially distill to two themes: (1) the findings emphasized minor portions of testimony, taken out of context in the sense that the majority of the testimony related to EBM's substantial efforts; and (2) the Department should have been more lenient and recognized that EBM's full performance was impracticable if not impossible.

EBM also asserts that it was not obligated to meet an actual deadline for paying claims, but was simply ordered to arrange for funding. According to EBM, eventually EBM fully complied with the order to arrange for funding claims, but some claims were not paid because the employer-clients would not execute a Claims Funding Agreement.

Due Process

EBM contends it was denied due process because the Department failed to hold an additional compliance hearing, which would have revealed the extent of EBM's "significant steps toward full compliance." Appellant's Brief at 13. The Fourteenth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. Due process clearly requires a fair opportunity to be heard. Roy A. Miller & Sons, Inc. v. Industrial Hardwoods Corp., 775 N.E.2d 1168, 1171 (Ind. Ct. App. 2002).

In this case, three hearings were conducted before the Final Order. The last hearing was held to address pending motions and to determine whether another evidentiary hearing would be needed. Commissioner Atterholt expressed an opinion that a hearing in two weeks would be pointless if there was no additional information to be forthcoming, and gave EBM's attorney the opportunity to respond. EBM's attorney asserted that he thought his clients were making good progress, but he was unable to represent to the Commissioner that outstanding issues would be resolved in two weeks. At that point, Commissioner Atterholt declined to set an additional compliance hearing.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey (Decatur County), Presiding

- Judge of the Court of Appeals since January 1998

L. Mark Bailey was raised in Decatur County on the family farm first homesteaded by his ancestors more than 150 years ago. He was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was retained on the Court by election in 2000. Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. A husband and father, he earned his B.A. from the University of Indianapolis in 1978; his J.D. from Indiana University School of Law at Indianapolis in 1982; and his M.B.A. from Indiana Wesleyan University in 1999. He was elected judge of the Decatur County Court in 1991. From 1992 until his appointment to the Court of Appeals, he served as judge of the Decatur Superior Court.

During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution committee, and he served on the Judicial Ethics Committee of the Indiana Judicial Center. Judge Bailey is Past-Chair of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. His writings include, "A New Generation for Pro Bono," published in the *Indiana Lawyer* in 2006. He is also a certified civil mediator and a Master in the Indianapolis American Inn of Court.

A strong supporter of law-related education, Judge Bailey is currently a member of the Judicial Education Committee of the Judicial Conference of Indiana. He is also an adjunct professor at the University of Indianapolis and, in February of 2006, served as the Distinguished Jurist in Residence at Stetson University College of Law. In 2004, Judge Bailey and his First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings.

Judge Bailey is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach at National Institute of Trial Advocacy programs. He also currently serves as the Moderator of the Indianapolis Bar Leadership Series.

In 2007, Judge Bailey, who chairs the Court's Administration Committee, was named to another term on the Board of Managers of the Indiana Judges Association and was awarded a judicial scholarship for the two-year National Resource Judges' program, sponsored by the U.S. Department of Justice, to study ways to resolve complex cases involving intricate or novel scientific and technical evidence.

"Appeals on Wheels"

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

The Court of Appeals has heard 202 cases "on the road" since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

- Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis.

Prior to joining the Court, Judge Robb was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges. Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YWCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, is married to a professor at Purdue. Their son, a graduate of the United States Naval Academy, is on active duty in the United States Navy.

The 15 judges of the Indiana Court of Appeals issue more than 2,800 written opinions each year.

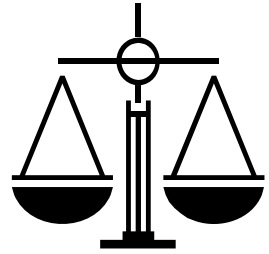
The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Terry Crone (St. Joseph County)

- Judge of the Court of Appeals since March 2004



Terry A. Crone was appointed to the Court of Appeals on March 8, 2004 and currently serves as the Presiding Judge of the Third District.

Judge Crone was raised in South Bend. He graduated *cum laude* from DePauw University in 1974 and from Notre Dame Law School in 1977. Judge Crone practiced law for nine years, concentrating in areas of civil practice, and served as the St. Joseph County Attorney from 1981 to 1986. In 1986, he was appointed Magistrate of the St. Joseph Circuit Court, where he served until his appointment as Judge of the St. Joseph Circuit Court in 1989.

Judge Crone is past President of the St. Joseph County Bar Association and a former member of the Board of Managers of the Indiana Judges Association, the

Supreme Court Committee on Character and Fitness, and the Alternative Dispute Resolution Committee of the Indiana Judicial Conference. Judge Crone is currently a member of the St. Joseph County, Indianapolis, Marion County, Indiana State and American Bar Associations, the American Judicature Society, and the Phi Delta Phi Honorary Legal Society.

Judge Crone is a frequent speaker at legal education programs. He helped found a program in South Bend to familiarize minority high school students with the law and related fields and was a founding member of the South Bend Commission on the Status of African-American Males and the St. Joseph County Coalition Against Drugs.

Judge Crone was retained on the Court of Appeals by election in 2006. He is married and has three daughters.

ATTORNEYS FOR THE PARTIES

For Appellants, Employee Benefit Managers, Inc. and Charles Belch:

Mark Ulmschneider
Steele, Ulmschneider & Malloy, LLP
Fort Wayne



Born in Cincinnati, Ohio, **Mark Ulmschneider** received a B.A. from DePauw University in 1975 and his J.D. in 1978 from Washington University School of Law. He was admitted to bar in 1978 in Indiana and the U.S. District Court for the Southern and Northern Districts of Indiana, and in Ohio in 1979.

Mr. Ulmschneider's primary practice areas are insurance defense, insurance arson defense, insurance coverage, and wills and estates. He is a member of the Allen County and Indiana State bar associations.

For Appellee, Indiana Department of Insurance:

David Steiner
Deputy Attorney General
Indianapolis

David Steiner, a native of Evansville, is married and has two children. He has a Bachelor of Arts degree in Political Science and History from Indiana University-Bloomington and a JD, also from Indiana University-Bloomington. His primary interests include travel, a variety of sports activities and gardening.

Mr. Steiner was a member of the Indiana Army National Guard for six years. He is a member of the Indiana State Bar Association, and during the majority of his 30-year legal career, he has been a civil litigator, primarily focusing on tort, civil rights, constitutional, agency, employment and labor matters. He has been lead counsel in numerous bench and jury trials in both Indiana state and federal courts and has presented oral arguments in dozens of cases in the United States Court of Appeals for the Seventh Circuit, as well the Indiana

Court of Appeals and the Indiana Supreme Court.

For the past six years, Mr. Steiner has been the Section Chief for civil appeals in the Office of the Indiana Attorney General. In that position, he has been responsible for managing much of the civil appeal litigation for the State of Indiana. The primary areas of focus for civil appeals involving the State include agency actions, tort and civil rights litigation, labor and employment matters, real estate and condemnation, environmental matters, contracts, child support, habeas corpus and the defense of the constitutionality of state statutes.

Mr. Steiner's volunteer activities are primarily associated with his membership and active participation in the Southport Presbyterian Church.